

# Michigan Law Review

---

Volume 61 | Issue 6

---

1963

## Prayer, Public Schools and the Supreme Court

Paul G. Kauper

*University of Michigan Law School*

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Constitutional Law Commons](#), [Education Law Commons](#), [First Amendment Commons](#), [Fourteenth Amendment Commons](#), [Religion Law Commons](#), and the [Supreme Court of the United States Commons](#)

---

### Recommended Citation

Paul G. Kauper, *Prayer, Public Schools and the Supreme Court*, 61 MICH. L. REV. 1031 (1963).

Available at: <https://repository.law.umich.edu/mlr/vol61/iss6/2>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

# MICHIGAN LAW REVIEW

---

Vol. 61

APRIL 1963

No. 6

---

## PRAYER, PUBLIC SCHOOLS AND THE SUPREME COURT

*Paul G. Kauper\**

PUBLIC reaction to the Supreme Court's decision in *Engel v. Vitale*,<sup>1</sup> decided in June 1962 and holding invalid a non-sectarian prayer prescribed for use in the public schools of the State of New York, made clear that the decision had touched a vital and sensitive spot in the national life.<sup>2</sup> Unfavorable response to the holding ranged from intemperate and abusive denunciation of the Court as Godless to more thoughtful and reflective criticism that was directed to various considerations such as that the Court in interpreting the first amendment had failed to give due weight to the place of religion in American tradition and life, had misinterpreted the original meaning and purpose of this amendment, had conferred a constitutional blessing upon secularism as the official American orthodoxy, and had unduly subordinated the majority will and the community consensus to the sentiments and wishes of a small minority. Some, while not disturbed by the result reached with respect to the problem immediately before the Court, saw large and portentous implications in the decision. Did it mean that the Constitution forbade not only religious practices in the public schools but also any consideration of religion in public school programs? And did it mean that all acknowledgments of Deity on official occasions was forbidden?

Not all of the immediate reaction to *Engel* was critical. Secularists and strict separationists hailed the decision as adding strength to the wall of separation between church and state, while others applauded the decision as a further contribution to religious freedom. Moreover, much of the initial criticism was dissipated when

\* Professor of Law, University of Michigan.—Ed.

<sup>1</sup> 370 U.S. 421 (1962).

<sup>2</sup> For some expression of opinion, see 108 CONG. REC. 11002-08 (daily ed. June 27, 1962); 108 *id.* 10883-86, 10897-98 (daily ed. June 26, 1962); Editorial, *Roundup on Prayer Case*, *America*, July 28, 1962, p. 541; N.Y. Times, July 1, 1962, § 4, p. 9, cols. 1-6; *id.*, June 28, 1962, p. 1, col. 4, p. 17, cols. 1-3; *id.*, June 27, 1962, p. 1, col. 8, p. 20, col. 3; *id.*, June 26, 1962, p. 1, cols. 6-8, p. 16, col. 7. See also Kurland, *The Regents' Prayer Case: "Full of Sound and Fury, Signifying . . ."*, 1962 SUPREME COURT REV. 1, 2.

the Court's full opinion was read and understood. A substantial part of the press and a number of religious leaders and groups announced their support of the decision as one which, by restricting the state's power to intervene in the sensitive area of prayer, thereby advanced and protected the liberty of both the believer and the non-believer.<sup>3</sup> Also, some who supported the holding asserted that it did not outlaw all recognition of religion in the public schools and had nothing to say whatever about acknowledgment of Deity in public pronouncements and on official occasions. The decision did not make God an outlaw so far as the national life was concerned. Likewise, any larger implications of the case with respect to the use of public funds or property to aid religious activities were attributable not to the majority opinion but to Mr. Justice Douglas' concurring opinion.

A more complete understanding of the case, while doing much to temper the initial outburst of disapproval, did not by any means dispel all criticism of the decision or allay all the apprehensions aroused by it. Believing that the Supreme Court's opinion was premised on a fundamentally erroneous interpretation of the establishment clause of the first amendment, Bishop James A. Pike headed a movement to amend the Constitution so as to restore what he regarded as the true and intended meaning of its pertinent language.<sup>4</sup> In the meantime, the Supreme Court has agreed to review and has heard argument on cases dealing with the constitutionality of Bible reading and recitation of the Lord's Prayer in public schools.<sup>5</sup> The decisions in these cases may be ex-

<sup>3</sup> See, e.g., Editorial, *Prayer is Personal*, N.Y. Times, June 27, 1962, p. 34, col. 1; Editorial, *The Christian Century*, July 4, 1962, p. 832; Miller, *True Piety and the Regents' Prayer*, *The Christian Century*, Aug. 1, 1962, p. 934; *Ruling on Prayer Upheld by Rabbis*, N.Y. Times, July 1, 1962, p. 48, col. 3; *Statement of 46 Protestant Clergymen*, *Time*, Aug. 24, 1962, p. 40.

<sup>4</sup> Bishop Pike proposed before the Senate Judiciary Committee that the first amendment be amended to read as follows: "Congress will make no law respecting the recognition, as an established church, of any denomination, sect or other religious association." For a statement of his views, see Debate by William J. Butler and the Rt. Rev. James A. Pike, *Has the Supreme Court Outlawed Religious Observance in the Schools?*, *Reader's Digest*, Oct. 1962, pp. 78-85. Bishop Pike declared that the Supreme Court's decision in effect "deconsecrates not merely the schools but the nation." *Id.* at 79.

For discussion and criticism of Bishop Pike's interpretation of the original and intended meaning of the establishment clause, see Smylie, *The First Amendment and Bishop Pike*, *The Christian Century*, Oct. 31, 1962, pp. 1316-18.

Some fifty-odd proposals to amend the Constitution in order to overcome the result of the *Engel* decision were introduced in the House of Representatives and in the Senate of the United States. For a brief discussion of several of these proposals, see Sutherland, *Establishment According to Engel*, 76 HARV. L. REV. 25, 50-52 (1962).

<sup>5</sup> The cases under review are *Murray v. Curlett*, 228 Md. 239, 179 A.2d 698, *cert. granted*, 371 U.S. 809 (1962), in which the Maryland Court of Appeals had sustained

pected to result in resumption of the public debate sparked by *Engel*.<sup>6</sup>

### I. THE NEW YORK TRIAL COURT'S OPINION

The facts of the *Engel* case are simply stated.<sup>7</sup> A local public school board, acting on the recommendation of the New York Board of Regents,<sup>8</sup> adopted a resolution directing the daily recitation of the following prayer which the Board had composed for this purpose:

"Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country."

The prayer was to be recited at the beginning of the school day, following the pledge of allegiance to the flag. The school board's regulation made no allowance for students who objected to participation, but the board did provide in an instruction that was not incorporated in its resolution or otherwise publicized that no child was to be required or encouraged to join in the prayer against his or her wishes. Only one request that a child be excused from saying the prayer was received in the schools of the district, which request was respected; and no child had directly asked to be excused from joining in the prayer, nor had either a parent or a child sought permission for a child to leave the classroom during the saying of the prayer. The petitioners, who were taxpayers of the school district and parents of children in the schools of the district and whose group included Jews, Unitarians, members of the Society of Ethical Culture, and one non-believer, after

the constitutionality of the Maryland school commissioner's rule requiring the daily reading of one chapter of the Bible and/or daily recital of the Lord's Prayer in public schools; *Schempp v. School Dist.*, 201 F. Supp. 815 (E.D. Pa.), *prob. juris. noted*, 371 U.S. 807 (1962), a decision of a federal three-judge court holding unconstitutional a Pennsylvania statute requiring ten verses of the Bible to be read daily in public schools and also the school district's practice of mass recitation of the Lord's Prayer. Argument on these cases was heard on February 28 and March 1, 1963.

<sup>6</sup> For discussion of the legal aspects of the *Engel* decision, see Ball, *The Forbidden Prayer*, *The Commonwealth*, July 27, 1962, p. 419; Kurland, *supra* note 2; Pfeffer, *State-Sponsored Prayer*, *The Commonwealth*, July 27, 1962, p. 417; Pfeffer, *Court, Constitution and Prayer*, 16 *RUTGERS L. REV.* 735 (1962); Smylie, *supra* note 4; Sutherland, *supra* note 4; 12 *DE PAUL L. REV.* 128 (1962); 31 *FORDHAM L. REV.* 201 (1962); 51 *GEO. L.J.* 179 (1962); 37 *TUL. L. REV.* 124 (1962); 24 *U. PITT. L. REV.* 179 (1962).

<sup>7</sup> The complete statement appears in the opinion of the trial court in *Engel v. Vitale*, 18 Misc. 2d 659, 191 N.Y.S.2d 453 (Sup. Ct. 1959).

<sup>8</sup> The recommendation with respect to the prayer was part of a total program set forth in the Regents' Statement on Moral and Spiritual Training in the Schools, adopted November 30, 1951. In 1955, this statement was supplemented by the Regents' Recommendations for School Programs on America's Moral and Spiritual Heritage.

an unsuccessful demand upon the school board that the daily prayer practice be terminated, brought a proceeding in a New York court for a mandatory order directing that the prayer practice be discontinued. Asserting that the use of this official prayer in the public schools was contrary to the beliefs, religions, or religious practices of both themselves and their children, they contended that the state's action, both in authorizing the use of this prayer and in ordering its daily recitation by children in public school classrooms, was unconstitutional. Reliance was placed upon the first and fourteenth amendments to the Constitution of the United States and upon the provisions of the New York constitution guaranteeing the free exercise and enjoyment of religious profession and worship, without discrimination or preference, and forbidding public aid to a school in which any denominational tenet or doctrine is taught.

It is unfortunate that all the attention riveted on the final opinion in the case by the United States Supreme Court has served to obscure the opinion by Justice Meyer of the New York trial court.<sup>9</sup> It was an extraordinarily able, thorough and scholarly opinion which did more to illuminate the problems and issues of the case than any other opinions at further stages of the litigation. The gist of the trial court's holding may be briefly stated before we take a closer look at the judge's opinion. He held that the prayer exercise did not violate that clause of the first amendment protecting the free exercise of religion so long as the school board established procedures designed to assure voluntariness of participation in the prayer practice by protecting those who objected to saying the prayer, and found also that it did not constitute an establishment of religion as forbidden by the first amendment. He further found that the prayer practice was not "denominational" within the meaning of the New York constitution and emphasized that this was a prayer *exercise* and not religious instruction in any real sense of the word. While he denied the petitioners the relief they had requested, he did direct the school board to adopt and publicize regulations stating the rules to be observed with respect to the rights of non-participants. He recommended for this purpose the regulation adopted by the New York City Board of Education, which made clear that neither teachers nor any school authority could comment on participation or non-participation in the exercise or suggest or require any par-

<sup>9</sup> *Engel v. Vitale*, 18 Misc. 2d 659, 191 N.Y.S.2d 453 (Sup. Ct. 1959).

ticular posture, language, or dress in connection with recitation of the prayer. Non-participation could take the form either of remaining silent during the exercise, or, if the parent or child so desired, of being excused altogether from the exercise. He recommended that the regulations provide that prayer participants could proceed to a common assembly while non-participants attended other rooms, or that non-participants would be permitted to arrive at school a few minutes late or attend separate opening exercises, or authorize any other procedure which assured equal freedom for both participants and non-participants.

The heart of the trial court's extensive and well-documented opinion dealt with the issues raised under the first amendment as made applicable to the states by means of the fourteenth amendment. Stating as a fundamental rule of interpretation that the meaning of a constitutional amendment is to be determined by the "sense of the nation" at the time of its adoption, Justice Meyer, after reviewing historical practices and pointing out that prayer and Bible reading in public schools have been common American practices, concluded that prayer recitation in public schools did not violate the fourteenth amendment as construed by the sense of the nation when this amendment was adopted in 1868. Recognizing, however, that the Supreme Court had held that the first amendment applies to the states by means of the fourteenth amendment, the trial court found no violation of the free exercise clause so long as the right of objectors not to participate in the prayer exercise was adequately protected. So far as the establishment clause was concerned, the court again relied upon historical practice and understanding to demonstrate the sense of the nation that recitation of prayers in public life was not "an establishment of religion" in the sense used in the Constitution or as understood by men such as Jefferson or Madison. Nor did the trial court find that the Supreme Court's opinions interpreting the establishment language required a different result. In the end it placed chief reliance upon the holding and opinion in the *Zorach*<sup>10</sup> case in concluding that some form of prayer would fall within the realm of permissible accommodation of the public school system to the religious needs of the nation.<sup>11</sup>

In weighing the reasons for including this kind of prayer exercise in the public school program, the trial court concluded

<sup>10</sup> *Zorach v. Clauson*, 343 U.S. 306 (1952).

<sup>11</sup> *Engel v. Vitale*, 18 Misc. 2d 659, 693-94, 191 N.Y.S.2d 453, 490-91 (Sup. Ct. 1959).

that it could not be justified on the ground that this was a means of familiarizing students with the religious nature of our heritage since there are other equally effective and constitutionally uninhibited means of achieving that end. Moreover, it could not be justified on the ground that the state could prescribe exercises designed to inculcate in pupils a love of God or to teach "spiritual values," since an exercise directed to such purposes would constitute religious instruction in violation of the establishment clause and in violation of the parents' right to control the education of his child. However, the court concluded that the recognition of prayer as an integral part of our national heritage was demonstrated by practices widely accepted at the time of the adoption of the first and the fourteenth amendments and that, therefore, these constitutional provisions could not have been intended to prohibit prayer in public schools any more than in other aspects of public life.<sup>12</sup>

In summary, the trial court concluded that, since the first and fourteenth amendments should be construed with reference to the "sense of the nation" at the time of their adoption and since recognition of prayer was an integral part of our national heritage, prayer in public schools did not constitute an establishment of religion and did not violate religious freedom so long as the regulations made clear that student participation in the prayer exercise was a voluntary matter and adequate provision was made for those children desiring not to participate.

The trial court's decision was affirmed on appeal by the New York appellate courts.<sup>13</sup> Their opinions rested on substantially the same grounds as those stated more extensively in the trial court's opinion. Judges Dye and Fuld of the New York Court of Appeals dissented on the ground that the prayer exercise violated the establishment clause as interpreted by the Supreme Court in *Everson*<sup>14</sup> and *McCollum*.<sup>15</sup>

## II. THE SUPREME COURT'S OPINIONS

The Supreme Court of the United States on review of the case reversed the decision of the New York Court of Appeals and found the prayer practice unconstitutional because it constituted an es-

<sup>12</sup> *Id.* at 673, 191 N.Y.S.2d at 470.

<sup>13</sup> *Engel v. Vitale*, 11 App. Div. 2d 340, 206 N.Y.S.2d 183 (1960), *aff'd*, 10 N.Y.2d 174, 176 N.E.2d 579, 218 N.Y.S.2d 659 (1961).

<sup>14</sup> *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

<sup>15</sup> *McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

tablishment of religion in violation of the first and fourteenth amendments.<sup>16</sup> The case was decided by a seven-man court, Justices Frankfurter and White not participating in the decision. The majority opinion written by Mr. Justice Black received the support of Mr. Chief Justice Warren and Justices Brennan, Clark and Harlan. Mr. Justice Douglas concurred in a separate opinion and Mr. Justice Stewart wrote a dissenting opinion.

At the outset, Mr. Justice Black stated the Court's conclusion that New York "by using its school system to encourage recitation of the Regents' prayer . . . has adopted a practice wholly inconsistent with the Establishment Clause."<sup>17</sup> In passages of the opinion that followed he stated that there was no doubt that the New York program of daily classroom invocation of God's blessings was a religious activity, that counsel was correct in asserting that the use of prayer to further religious beliefs breached the constitutional wall of separation between church and state, and that the constitutional prohibition "must at least mean that in this country it is no part of the business of government to compose official prayers for any group of American people to recite as a part of a religious program carried on by government."<sup>18</sup>

In building up his case on the significance of the first amendment's establishment clause in its application to the prayer situation, Mr. Justice Black drew upon the history of practices in England whereby Parliament, in asserting control over the established Church of England and over the Church's Book of Common Prayer, determined what prayers should be included in this book. Objections to this practice led some people to come to this country to find religious freedom, and in England the control by Parliament over prayer led to competition of various groups to secure approval of their particular form of prayer. Mr. Justice Black then stated that many of those who came to this country to find religious freedom in turn established their official religions and were equally intolerant and oppressive. Nevertheless, intensive opposition to the practice of establishing religion by law followed in the wake of the Revolutionary War. This movement crystallized rapidly into an effective opposition that eventually led to the enactment of the famous "Virginia Bill for Religious Liberty," by which all religious groups were placed on an equal footing so far as the state was concerned. By the time, then, that

<sup>16</sup> *Engel v. Vitale*, 370 U.S. 421 (1962).

<sup>17</sup> *Id.* at 424.

<sup>18</sup> *Id.* at 425.



the Constitution was adopted there was widespread awareness among many Americans of the danger of a union of church and state—the danger to the freedom of the individual to worship in his own way when government places its stamp of approval on one particular kind of prayer, and the bitter strife that comes when zealous religious groups struggle to obtain the government's approval from each ruler that may temporarily come to power. The first amendment to the Constitution was added as a guarantee that neither the power nor the prestige of the federal government would be used to control, support or influence the kinds of prayer the American people can say.

Mr. Justice Black then stated there could be no doubt that the New York school prayer program officially established the religious beliefs embodied in the Regents' prayer and so violated the establishment clause of the first amendment which is operative against the states also "by virtue of the fourteenth amendment."<sup>19</sup> It was immaterial that the prayer was "non-denominational" or that the observance of prayer practice by students was voluntary. Voluntarism might free the prayer from objections under the free exercise clause but not from the establishment clause. The two clauses, even though they overlap, forbid two quite different kinds of "encroachment upon religious freedom."<sup>20</sup> The establishment clause does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion, whether these laws operate directly to coerce non-observing individuals or not. But at this point Mr. Justice Black saw fit to inject that this is not

"to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."<sup>21</sup>

But, continued Mr. Justice Black, the purposes underlying the establishment clause go much farther than that. Its first and most immediate purpose is grounded on the belief that a union of government and religion tends to destroy government and to

<sup>19</sup> *Id.* at 430.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Id.* at 430-31.

degrade religion. Another purpose rests upon an awareness of the fact that governmentally established religion and religious persecution go hand in hand.

Denying that this application of the Constitution to prohibit state laws respecting an establishment of religious services in public schools indicated a hostility to religion or toward prayer, Mr. Justice Black, noting that the history of man is inseparable from the history of religion and also that men of faith in the power of prayer led the fight for adoption of the Constitution and the Bill of Rights, concluded:

“It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.”<sup>22</sup>

Referring to the argument that the Regents' prayer did not amount to a total establishment of one particular religion and that governmental endorsement of this prayer was relatively insignificant when compared with the governmental encroachments upon religions which were commonplace two hundred years ago, Mr. Justice Black quoted the following words from James Madison, whom he described as “the author of the first amendment”:

“It is proper to take alarm at the first experiment on our liberties . . . . Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?”<sup>23</sup>

Mr. Justice Douglas concurred in a separate opinion in which he premised his whole case on the argument that government cannot constitutionally finance a religious exercise. He made clear that in his opinion there was no element of compulsion or coercion involved in the New York prayer practice. But he condemned New York's action because it financed a religious exercise and went

<sup>22</sup> *Id.* at 435.

<sup>23</sup> *Id.* at 436.

on to state his opinion that all practices (and in a footnote he referred to numerous ones), whereby a public official on a public payroll performs or conducts a religious exercise in a governmental institution, fall within the same category. While he could not say that to authorize this prayer was to establish religion in "the strictly historic meaning"<sup>24</sup> of those words, yet once government finances a religious exercise it inserts a divisive influence into our communities. The first amendment leaves the government in a position not of hostility to religion but of neutrality. If government interferes in matters spiritual, it will act as a divisive force. "The First Amendment teaches that a government neutral in the field of religion better serves all religious interests."<sup>25</sup>

Mr. Justice Stewart dissented. Emphasizing that it could not be argued that New York had interfered with the free exercise of anybody's religion, he rejected the idea that letting those who wanted to say this prayer say it thereby established "an official religion." On the contrary, he viewed the prayer practice as an opportunity for children to share in the nation's spiritual heritage. Unimpressed by the review in the majority's opinion of the history of an established church in England or in eighteenth century America, he found much more relevant, as an aid to interpretation of the first amendment, "the history of the religious traditions of our people, reflected in countless practices of the institutions and officials of our government."<sup>26</sup> He pointed to the prayers used in opening the Supreme Court's daily session and the daily sessions of both houses of Congress, the prayer found in the third stanza of the National Anthem, the motto "In God We Trust" impressed on our coins, and the inclusion of the phrase "under God" in the pledge of allegiance to the flag. He stated that it was all summed up in the Court's opinion in *Zorach* when it said, "We are a religious people whose institutions presuppose a Supreme Being."<sup>27</sup> What New York had done, as well as the Court, the Congress and the President, had been "to recognize and to follow the deeply entrenched and highly cherished spiritual traditions of our Nation."<sup>28</sup>

<sup>24</sup> *Id.* at 442.

<sup>25</sup> *Id.* at 443.

<sup>26</sup> *Id.* at 446.

<sup>27</sup> 343 U.S. at 313.

<sup>28</sup> *Engel v. Vitale*, 370 U.S. at 450.

## III. THE SCOPE OF THE HOLDING

What then is the significance of the *Engel* case? Viewed with reference to its facts, the case can be limited to a narrow holding, namely, that a state may not prescribe the daily recitation by children under the teacher's supervision of an officially composed prayer in a public school classroom as part of the school's regular program. All of these elements become significant. Not only was the state sanctioning a particular prayer but was using the public school system's machinery to make it an official prayer, and by requiring it as a part of the regular school program conducted by the teacher—the symbol of classroom authority—it was encouraging children to participate. Indeed, in view of all the circumstances, and with due recognition of the psychology of the classroom, objecting children, though free not to participate, were subject to a subtle pressure to conform.

The *Engel* decision reaches only the official prescription of an officially approved prayer for daily recitation in a public school classroom. Of course, it does not outlaw prayer in the public schools. Pupils and teachers are free to engage in silent prayer, and it is consistent with the decision to permit a period for silent prayer. Moreover, it is important to note that the case deals with an officially approved prayer which the teacher is *required* by order of the school board to conduct. The case does not deal with the situation where those in charge of the classroom have a discretionary authority to permit opportunity for children voluntarily to express their individual prayers. Nor does the case deal with the question whether ministers may offer prayers in connection with public school programs. In neither of these situations are public officers or employees charged with a duty of conducting in a public school a religious program centered on a state-approved prayer. It was the degree of the state's involvement in this particular prayer, infusing it with the force and compulsive character of state-sanctioned action, which peculiarly identifies the problem of the *Engel* case and also suggest the limits on the holding.

Even less does the holding in *Engel* suggest that the public schools must display a studied indifference to religion or exclude from their programs a consideration and appreciation of religion in the nation's life or deny opportunity for children, individually or collectively, to engage in exercises that reflect belief in God or acknowledge the nation's dependence upon Him. The following

passage taken from a footnote to the majority opinion is of special interest in this connection:

"There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God."<sup>29</sup>

This important statement is a concession by the Court which in a very significant way limits the holding and rationale of the case. Even though the Court goes on to say that "such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance," the fact remains that whether children sing or recite a prayer and whether the prayer is identified with expressions of patriotic sentiment or not, the school program is being used to encourage an expression of religious faith in accordance with the dominant national and community *ethos*. The distinction is made by the Court that such patriotic exercises are not distinctively religious in character. How solid a basis this is for distinction is questionable. The non-sectarian prayer in its invocation of God's blessing upon "our country" also fosters love of country. Moreover, since the prayer followed the pledge of allegiance to the flag, it could be viewed as part of a total program in which patriotic and religious sentiments were commingled. The Court in the footnote passage referred to did not expressly mention the pledge of allegiance, which now contains the phrase "under God." But if the national anthem, including its third stanza which is distinctively a prayer, can appropriately be sung in the public schools, it should follow also that recitation of the pledge of allegiance is permitted.

Whether a distinction drawn in legal terms between school exercises which are primarily religious in character, even though they include an underlying patriotic sentiment and can be said to be directed to patriotic ends, and those which are primarily patriotic in character and yet are also infused with a religious

<sup>29</sup> *Id.* at 435 n.21.

sentiment and consciousness, is a substantial and tenable one is open to question. At most it is a distinction of degree, and under such a test some form of prayer would be permissible. It seems to the writer that the element which adds substance to the distinction drawn by the Court is that the religious beliefs and sentiments expressed in national historical documents and utterances and in the National Anthem have been an established part of the national tradition as compared with a prayer specially composed by state authorities for official use and lacking the sanction established by common and nationwide historical usage. This at once raises the question whether the fact that the non-sectarian prayer was an officially *composed* as well as an officially approved prayer was an important element in the decision. The language in the body of the opinion as well as the distinction made in the footnote discussed above suggest that this was a critical factor. But should it be? On the surface it should be immaterial whether public school authorities themselves compose a prayer prescribed for recitation in public schools or adopt for official use a prayer composed by some other person or persons or regularly used by one or more religious bodies. In either case the government is putting its stamp of approval upon a particular prayer. But if, as suggested above, a distinction can be made between the historic expressions of religious faith that have evolved out of the national life and have become a part of the common national heritage and those not similarly sanctioned by history, the fact that a prayer actually originates with public officials does assume special significance. This question assumes a critical importance in cases which are presently before the Court and which raise the issue whether recitation of the Lord's Prayer in the public schools comes under the ban of the *Engel* decision.<sup>30</sup> Here is a prayer sanctioned by historical usage and one reflecting the common religious heritage of a majority of Americans. It cannot be attributed to the government. On its face the Lord's Prayer is non-sectarian but it is subject to special attack on the ground that it is distinctively the prayer of Christians and that hence the state in presenting or authorizing its use is preferring one religion over another. In this situation it appears likely that the Court, faced with the choice of either approving the recitation of the Lord's Prayer on the ground that it is not officially composed but has its

<sup>30</sup> *Schempp v. School Dist.*, 201 F. Supp. 815 (E.D. Pa.), *prob. juris. noted*, 371 U.S. 807 (1962); *Murray v. Curlett*, 228 Md. 239, 179 A.2d 698, *cert. granted*, 371 U.S. 809 (1962).

own special sanction in history or holding it invalid as sectarian and preferential in character, will follow the latter course. If this proves to be the case, the element of official composition loses its significance, and officially recognized prayers and acknowledgments of Deity may be prescribed for daily ritualistic use in public schools only if incorporated in an exercise of recitation or song which in its totality is characterized as patriotic in character.

The cases<sup>31</sup> before the Court this term also involve state laws which require or authorize the reading without comment of a chapter of the Bible or a certain number of biblical verses at the beginning of the school day. Here the considerations are somewhat different. Students are not asked to recite something as an expression of their own religious belief. The religious and moral ideas of the Bible carry their own spiritual authority, unlike religious ideas stamped as authoritative because they are composed and approved by public officials. In relation to religion, morality and culture, the Bible as a book assumes a prominent place in the world's literature. No one can seriously argue that exposure to or study of the Bible is out of place in the public schools. But the Bible can also be characterized as a sectarian book. For Christians, the Bible is the book of historic revelation on which their faith is founded. The Jewish religious community looks to the Old Testament for its sacred scripture. Any use of the New Testament in the public schools to promote the Christian faith is offensive to persons of the Jewish faith. And in turn Catholics object to the use of biblical translations which they regard as distinctively Protestant in character. Objections may be made by other persons of varying beliefs to any use of the Bible which carries the connotation that it is officially regarded and accepted as revelation of divine truth. Despite these considerations, it should be permissible to read and study the Bible in the public schools both because of its historical and literary features and because it is a source of religious and moral ideas that have influenced our culture and civilization. But to use it in the public schools as a means of religious indoctrination or for the cultivation of religious faith is objectionable. The difficulty with a prescribed daily reading of the Bible without comment is that, rather than a meaningful program of study, it becomes more like a religiously ritualistic exercise, premised on the assumption that the Bible's teachings are inspired and authoritative, and subject to

<sup>31</sup> Cases cited in note 30 *supra*.

the charge that the state is thereby giving a preference to the religious groups that regard the Bible as their sacred scripture. But to state these considerations is to recognize that Bible reading in the public schools does raise considerations not present in the prayer case. State courts have disagreed on whether Bible reading is a forbidden form of sectarian instruction.<sup>32</sup> In the light of the long history of this practice, its widespread prevalence at present, its sanctioning by a number of state courts, and doubts that the Court may entertain as to whether Bible reading is as distinctively a religious exercise as the recitation of a prayer and whether such reading serves a valid educational purpose, the way is open to the Supreme Court, if it so chooses, to hold that *Engel* does not require the invalidation of Bible-reading practices.

With respect to other aspects of the general problem respecting religion and the public schools, the *Engel* decision makes no directly relevant contribution. The majority opinion does not cite the released-time cases, and the case has no immediate bearing upon the continued validity of the distinction drawn by the Court between released time on the school premises<sup>33</sup> and released time off the school premises.<sup>34</sup> While the *Engel* opinion is premised on the ground that the school program cannot be used to promote religious exercises and religious indoctrination, thereby suggesting that all forms of released time are invalid, a distinction can clearly be observed between the state's promotion of religious faith by means of an officially adopted prayer prescribed for daily recitation under the supervision of a publicly paid teacher, and the state's willingness to excuse children for one hour of the week from the public school's regular program in order to permit opportunity for religious instruction at the hands of teachers furnished by the churches. What the state can do to sanction a state-sponsored religious exercise as part of a public school's daily program and what it can do to accommodate its public school program to a felt need for religious instruction furnished by the churches, thereby acting to implement religious freedom, are two different questions. In both situations it may be claimed that the state is establishing religion, but in the released-time situation

<sup>32</sup> The majority of state courts that have dealt with the problem have upheld Bible-reading practices. For a review of the cases, see *Engel v. Vitale*, 18 Misc. 2d 659, 691-94, 191 N.Y.S.2d 453, 488-90 (Sup. Ct. 1959); Harrison, *The Bible, the Constitution and Public Education*, 29 TENN. L. REV. 360 (1962).

<sup>33</sup> *McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

<sup>34</sup> *Zorach v. Clauson*, 343 U.S. 306 (1952).



there is a stronger basis for asserting that the establishment limitation should yield to the competing free exercise principle. Even Mr. Justice Douglas, in his far-reaching and, for the most part, gratuitous opinion, in which he stressed that public funds or property cannot be used to finance religious exercises conducted by public officials, gave no indication that he now regards the *Zorach* decision as an incorrect one.<sup>35</sup>

Finally, in appraising the reach of *Engel*, it is clear that it has little if any relevancy in respect to prayers or acknowledgment of Deity in phases of public life apart from the public school situation. Thanksgiving proclamations and declaration of a day of prayer by the President, prayers by ministers on public occasions, the use of chaplains to open sessions of Congress, the inscription of "In God We Trust" on our coins—all involving a recognition of the place of prayer and of the religious consciousness in our national life—are distinguishable. In none of these cases is government prescribing an official form of prayer or an official expression of religious belief for the public's own use. Moreover, the situation is totally unlike that of the problem presented in the classroom, where immature and impressionable children are susceptible to a pressure to conform and to participate in the expression of religious beliefs that carry the sanction and compulsion of the state's authority.

The conclusion that *Engel* does not admit of the wide interpretation given to it, particularly in the immediate response to the decision, is supported by the unusual extra-judicial statement by Mr. Justice Clark who, in the course of a public address and with reference to the criticism directed at the school prayer decision, said that it was a misinterpretation of the decision to say that it barred all religious observances in the public schools or other public places. Nor, according to him, did the Court hold that "there could be no official recognition of a Divine Being . . . or public acknowledgment that we are a religious nation." All the Court did, Mr. Justice Clark continued, was to rule unconstitutional "a state-written prayer circulated to state-employed teachers with instructions to have their pupils recite it in unison at the beginning of each school day."<sup>36</sup>

<sup>35</sup> But cf. *McGowan v. Maryland*, 366 U.S. 420, 563-64 (1961) (Douglas, J., dissenting).

<sup>36</sup> For excerpts of Mr. Justice Clark's address made at the Commonwealth Club in San Francisco, Aug. 3, 1962, see N.Y. Times, Aug. 4, 1962, p. 9, col. 1.

## IV. CONSTITUTIONAL THEORY

The attempt has been made up to this point to examine the reach of the *Engel* decision. We turn now to an analysis of the *Engel* holding and opinion in terms of basic constitutional theory respecting the first and fourteenth amendments on which the Court relied.

A. *The Establishment Clause of the First Amendment*

The Court found that the state action involved in the *Engel* situation violated the first amendment as made applicable to the states by the fourteenth amendment. More particularly, the prayer practice prescribed under authority of New York law violated the provision of the first amendment prohibiting laws respecting an establishment of religion. It is important to note that the Court expressly stated that it was not resting its case on the free exercise clause of the first amendment, although it did observe that it was plain that objecting children were placed under implied pressure to conform by participating in the prayer. The Court interpreted the establishment clause as stating an independent limitation which may overlap the free exercise clause in part but which also reaches wider objectives. The officially prescribed New York prayer was held invalid because it established the religious beliefs expressed in the prayer and thereby became a law respecting an establishment of religion.

In commenting on these propositions, it should be pointed out, first of all, that the majority opinion did not cite a single case in support of the conclusions reached by it. Indeed, the decision is unique in its failure to cite, much less discuss, earlier opinions dealing with the interpretation of the establishment limitation. This is all the more remarkable since the Court in the celebrated *Everson* opinion<sup>37</sup> had laid down broad statements on the meaning of this limitation, and in its *McCorm* decision<sup>38</sup> had invalidated a program of released time on public school premises on the ground that this constituted a use of the publicly owned and operated school system to enlist students for religious instruction in violation of the ideas first advanced in *Everson*. In the well-known dicta of his *Everson* opinion, Mr. Justice Black had stated that the effect of the first amendment's twin phrasing was to establish a principle of separation of church and state, and

<sup>37</sup> *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

<sup>38</sup> *McCorm v. Board of Educ.*, 333 U.S. 203 (1948).

he had referred to Jefferson's letter in which he characterized the Constitution as establishing a wall of separation between church and state. He had further stated that the effect of the first amendment's establishment clause was not only to forbid an established church or to forbid giving a preference to one or more religions, but that it went farther and forbade aid to all religions, whether preferential or not, and that tax monies could not be spent to support any religious activities or institutions. Thus, the *Everson* opinion had read into the first amendment a theory of strict separation of church and state going far beyond the notion of an established church in the historic sense of the word.

The simplest explanation of the Court's failure to cite any precedent is that the earlier cases, dealing with use of public funds to provide for the transportation of children to parochial schools, with programs of released time for religious instruction furnished by the churches—whether on or off the school premises—and with Sunday closing laws, were not directly in point. The closest analogy was furnished by the *McCullum* decision, where the Court had invalidated a program of released time for religious instruction conducted on the school's premises by teachers who were furnished by the churches. This case supported the broad proposition that no part of the public school program could be used in the furtherance of religious instruction or exercises on the school premises. But *McCullum* involved a close working relation between the schools and the churches and a substantial use of public school property for religious instruction. Neither factor was present in *Engel*. Apart, however, from reliance on the precedent furnished by the *McCullum* decision, Mr. Justice Black could have found much in the language he used in his prior opinions for the Court in *Everson* and *McCullum* to support the ideas relied upon in *Engel*. He had stated in *Everson* that government cannot pass laws "which aid one religion, aid all religions, or prefer one religion over another."<sup>39</sup> In the *McCullum* opinion he had cited this language with approval. The prescribed non-sectarian prayer could easily be characterized either as an aid to all religions or as a preference for the particular religious beliefs embodied in this prayer. Why Mr. Justice Black chose to disregard his opinions in *Everson* and *McCullum* is a matter for speculation. In view of the statement by Mr. Justice Douglas in his concurring opinion, that he now regards the actual decision in *Everson* as

<sup>39</sup> 330 U.S. at 15.

incorrect,<sup>40</sup> it may be that Mr. Justice Black's failure to cite *Everson* assumes substantial significance. His failure to cite *McCollum* is perhaps more readily explained, since any reference to *McCollum* would have been incomplete without citing *Zorach* as well. Not only did *Zorach* limit *McCollum* by holding that a program of released time for religious instruction was valid if conducted off the school premises, but Mr. Justice Douglas' opinion had indicated a substantial retreat in the interpretation of the establishment clause from that enunciated in the *Everson* opinion. He had stated there that the first amendment did not establish an over-all principle of separation of church and state, that the state could take account of the religious interests of its people and that it could accommodate its public school program to these interests. The *Zorach* opinion thus undermined the absolutism expressed in *Everson* and *McCollum* and appeared to recognize that the establishment limitation must at times be balanced against the free exercise principle and that the legislature may in appropriate instances, in the interest of neutrality, choose to advance the free exercise of religion at some expense to the establishment prohibition. It is for these reasons that *Zorach* was generally regarded as substantially limiting, if not undermining, much of what was said in *Everson* and *McCollum*<sup>41</sup>—a view that seemed to be shared by the four Justices, including Mr. Justice Black, who dissented so vigorously in *Zorach*. It is understandable, therefore, that Mr. Justice Black in writing the opinion in *Engel* wished to avoid any discussion of precedents that might involve his approval of *Zorach* and the views stated there. Finally, it is open to speculation also that differences within the Court in interpreting and reconciling the prior cases and the supporting opinions made it prudent for Mr. Justice Black, in writing an opinion that would command the support of at least four other Justices, to avoid all discussion of prior cases. But Mr. Justice Black's opinion, although it does not rely on prior cases, does appear to restore the broad and absolutist interpretation of the establishment clause first stated in the *Everson* opinion.<sup>42</sup>

<sup>40</sup> 370 U.S. at 443.

<sup>41</sup> See *Engel v. Vitale*, 18 Misc. 2d 659, 686-89, 191 N.Y.S.2d 453, 483-86 (Sup. Ct. 1959); KAUPER, CIVIL LIBERTIES AND THE CONSTITUTION 17-19 (1962) [also located in Kauper, *Church and State: Cooperative Separatism*, 60 MICH. L. REV. 1, 10-13 (1961)].

<sup>42</sup> Mr. Justice Douglas' views may have a vital impact on the course of the Court's future decisions in this area. Opinions expressed by him in dissent in the Sunday closing law cases [See, e.g., *McGowan v. Maryland*, 366 U.S. 420, 563-64 (1961).], together with his emphasis in his separate opinion in *Engel* on the idea that no public funds or properties can be used to finance religious exercises and his express questioning

Whether the *Everson* opinion, postulating a broad no-aid-to-religion idea, correctly stated the meaning of this clause is open to serious question.<sup>43</sup> As Mr. Justice Douglas frankly recognized in his concurring opinion in *Engel*, the prescription of a school prayer for voluntary participation by students is not an establishment of religion within the historic meaning of this language. In *Everson*, Mr. Justice Black relied in large part on the views of James Madison and Thomas Jefferson in giving the establishment language its broad construction.<sup>44</sup> Madison and Jefferson viewed this language as furnishing protection for freedom of conscience and protection against ecclesiastical domination of political affairs by imposing a barrier to any kind of governmental sanction or support of religious activities. In their view the establishment language served as a counterweight to the free exercise clause. But there is no evidence that the committee that approved the text of the first amendment and the Congress that submitted the amendment and the state legislatures that approved it supposed that the establishment language carried the wide connotations attributed to it by Madison.<sup>45</sup> There is, however, some evidence to support the conclusion that those responsible for the final wording used in the first amendment—and this included persons besides Madison<sup>46</sup>—did have in mind something more than an officially established church and something more than giving a

of the result reached in *Everson*, raise the question whether Mr. Justice Douglas still adheres to the ideas he expressed in *Zorach*. On the other hand, his failure in his separate opinion in *Engel* to repudiate the result in *Zorach*, all the more conspicuous because of doubts he expressed as to the holding in *Everson*, may indicate that he continues to draw the line between use of public funds, property and personnel in aid of religious instruction and exercises and "accommodation" of the public school program to religious instruction given under church auspices off the school premises.

For discussion of the *Engel* opinion with reference to *McCollum* and *Zorach*, see Kurland, *supra* note 2, at 25-29; Sutherland, *supra* note 4, at 30-35.

<sup>43</sup> For varying interpretations of the intended meaning of the establishment language, see PARSONS, *THE FIRST FREEDOM* (1948); 1 STOKES, *CHURCH AND STATE IN THE UNITED STATES* 538-61 (1950); Katz, *Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426 (1953); Pfeffer, *Church and State: Something Less Than Separation*, 19 U. CHI. L. REV. (1951).

<sup>44</sup> For Madison's view and for a discussion of his part in the drafting of the text of the first amendment, see BRANT, *JAMES MADISON: FATHER OF THE CONSTITUTION, 1787-1800*, at 264-75 (1950). See also Brant, *Madison and the Prayer Case*, *The New Republic*, July 30, 1962, p. 18.

<sup>45</sup> For a detailed examination of the proceedings of the congressional committee that drafted the religion clauses of the first amendment, see 1 STOKES, *op. cit. supra* note 43. See also Smylie, *supra* note 4.

<sup>46</sup> 1 STOKES, *op. cit. supra* note 43, at 543-48, attributes chief credit to Samuel Livermore for the wording and questions the widely held idea that Madison composed the final draft. He states also that Madison's great emphasis was on securing a "legal equality" among sects. *Id.* at 548.

preference to one or more religions. Fragmentary evidence supports the idea that this language was intended to keep Congress "from establishing articles of faith or a mode of worship."<sup>47</sup> It does not appear to be a distortion of words to say that prescription of an official prayer for recitation in public schools is the establishment of an official mode of worship and is, therefore, forbidden. But, as a practical matter, even this interpretation in its application to prayer in schools is open to question when consideration is given to the practical construction afforded by the whole course of American history. Here the opinion of the New York trial court is particularly illuminating in showing that public recognition of prayer and of Deity reflected the "sense of the nation" at the time of the adoption of the first and fourteenth amendments and should be taken into account in the process of constitutional interpretation. It is indeed remarkable that Mr. Justice Black in his opinion in *Engel* completely disregarded the long history with respect to prayers in public life and in schools.

Mr. Justice Black did refer to history—the control of the Book of Common Prayer by Parliament and the evils resulting from it and the concern that eventually developed in this country that there should be no union of church and state, since such a union tended to degrade religion and to subject the state to risk of ecclesiastical domination. But, as Mr. Justice Stewart pointed out in his dissenting opinion, it is a far cry from control of prayer in an officially established church to a public school program that gives opportunity for voluntary participation in common prayer.<sup>48</sup> Insofar as the Court relied on history in *Engel*, it followed a highly selective process in determining what history was relevant. The Court's selection of history in determining what it will read into the establishment clause is in itself a highly subjective process. But in this respect *Engel* again demonstrates that the Constitution is what the judges say it is.

It seems clear that, if the no-aid-to-religion principle is a valid interpretation of the establishment language, the Court reached a correct result in the *Engel* case. In *Everson*<sup>49</sup> the Court upheld the expenditure of public funds to reimburse parents for the cost of transporting children to parochial schools. The Court recog-

<sup>47</sup> 1 STOKES, *op. cit. supra* note 43, at 546; Katz, *supra* note 43, at 434. See also Smylie, *supra* note 4.

<sup>48</sup> For a brief discussion of the historical arguments and their relevancy, see Kurland, *supra* note 2, at 22-25.

<sup>49</sup> *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

nized that this resulted in aid to parochial school education but said that this result was incidental to the valid secular purpose of promoting the safe transportation of children to school. In the Sunday closing law cases<sup>50</sup> the Court held that the validity of Sunday laws as proper exercises of the police power to promote the general welfare was not impaired by the fact that they had the incidental effect of favoring the Christian day of worship. Thus, the Court, in the cases where it has purported to follow an absolutist interpretation of the establishment language, has, nevertheless, permitted aid to religion as an incident to a lawful secular purpose. But in the *Engel* case the prayer practice was seen to be directed to wholly religious ends and the aid to religion was primary and not incidental. The opposing argument that the prayer exercise was intended to serve a patriotic purpose by creating an awareness and appreciation of prayer as part of the American heritage proved too much and if accepted would have undermined the whole no-aid idea. Nevertheless, the Court itself came perilously close to this idea and created difficulties for itself when it recognized that school children may properly be encouraged to recite patriotic passages containing references to Deity and to sing the National Anthem which in its third verse incorporates a prayer that expresses some of the same sentiments found in the New York Regents' prayer. As pointed out earlier, this is justified on the ground that such activities are not distinctively religious exercises. To put the matter in another way, schools may engage in religious exercises if they are incident to patriotic purposes. All of this suggests that the no-aid principle is not so absolute as it sounds and is not a very viable principle for solving problems with respect to the interrelationship of government and religion. Moreover, the whole course of American governmental practices, not only in giving recognition to the nation's religious heritage and consciousness but also in sanctioning various forms of direct and indirect assistance for religious activities, is a repudiation of the extreme Madisonian view and lends no support to the kind of absolutism that appears on the surface in the *Engel* opinion.<sup>51</sup>

Reference may be made at this point to alternative theories

<sup>50</sup> *McGowan v. Maryland*, 366 U.S. 420 (1961); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Gallagher v. Crown Kasher Super Mkt.*, 366 U.S. 617 (1961).

<sup>51</sup> See examples cited in *Engel v. Vitale*, 370 U.S. 421, 437 n.1 (1962) (Douglas, J., concurring); FELLMAN, *THE LIMITS OF FREEDOM* 40-41 (1959); KAUPER, *CIVIL LIBERTIES AND THE CONSTITUTION* 35-39 (1962) [also located in Kauper, *Church and State: Cooperative Separatism*, 60 MICH. L. REV. 1, 26-29 (1961)].

on the construction of the free exercise and establishment clauses of the first amendment. Mr. Justice Douglas in speaking for the majority in *Zorach*<sup>52</sup> stated that government must be neutral between sects, and in his concurring opinion in *Engel*<sup>53</sup> stated that government must be neutral in the field of religion. Professor Katz has advanced the idea that the primary thrust of the first amendment's religious clauses is to protect religious liberty, that this objective is best attained when government remains neutral in respect to religious matters, but that government must abandon neutrality in some situations where adherence to the establishment limitation would result in an interference with the free exercise of religion.<sup>54</sup> Professor Kurland proposes the thesis that the first amendment requires the government to be neutral in the sense that it can do nothing to hinder or promote religion as such, that is, religion or religious activities cannot be the basis for classification.<sup>55</sup> The difference between the Douglas and Katz view, on the one hand, and the Kurland view, on the other, is that the former is addressed to the problem of neutrality within the framework of a first amendment view that recognizes the free exercise and establishment principles as independent, sometimes overlapping, and sometimes competing principles, whereas the Kurland thesis accepts these principles as mutually exclusive of each other. It is fair to say that the Supreme Court's opinions on the whole reflect the view that the two religion clauses of the first amendment state independent limitations, and that the problem of neutrality may be approached on this basis.

It is clear that government must be neutral as between competing religious claims. It may not prefer one religion over another. But to say that government must be neutral as between religion and non-religion raises more questions. If this means that government can do nothing which in fact aids religion, this may in some situations mean that government must discriminate against religion and thereby violate the free exercise clause. The Constitution does not require this. On the contrary, any meaningful concept of neutrality must permit government some dis-

<sup>52</sup> 343 U.S. at 314.

<sup>53</sup> 370 U.S. at 443.

<sup>54</sup> Katz, *supra* note 43, at 428.

<sup>55</sup> KURLAND, RELIGION AND THE LAW 17-18, 111-12 (1962). The *Engel* decision is clearly in accord with Professor Kurland's thesis since, by prescribing a religious exercise, the state was acting on the basis of a classification that promoted religious activity as such. For his analysis and comments on *Engel*, see Kurland, *The Regents' Prayer Case: "Full of Sound and Fury, Signifying . . ."*, 1962 SUPREME COURT REV. 1.



cretion in striking a balance between the establishment and the free exercise principles since they may conflict. If neutrality means that government must be indifferent to religion, and must base its policies, actions and programs on the theory that religion is irrelevant to life, it means that government is committed to a philosophy of secularism, and then the question must be raised whether secularism as an officially established orthodoxy is any more consistent with the first amendment than a religious orthodoxy.<sup>56</sup> But such a conception of neutrality is inconsistent with the unbroken tradition of American life in giving expression to the religious habits and consciousness of the American people, a tradition supporting the Court's assertion in *Zorach* that "we are a religious people whose institutions presuppose a Supreme Being."<sup>57</sup> Indeed, if the public schools disregard the religious factors in the educational process, they are not neutral. Neutrality is a two-edged sword and its application in a given situation invites study of a variety of considerations.

The decision in *Engel* may be measured by the standard of neutrality. Clearly the state's action in sanctioning a particular prayer was an expression of governmental preference for the religious beliefs embodied in that prayer, and to this extent it discriminated against persons who did not accept these principles or who preferred to pray in another way. The state, then, was not being neutral in the narrower sense of the term. But did the Court in denying the state the power to prescribe an official prayer for recitation in public schools thereby compel the state to discriminate on the basis of religion or to interfere with religious freedom? Although the argument was made before the Court that the prayer exercise implemented the religious freedom of children who wanted to participate, the proposition that the right to recite prayers in public schools is *essential* to religious freedom is hardly convincing. The general right of prayer is not affected by the decision and, as previously noted, some form of prayer in the classroom is consistent with the *Engel* decision. Nor can it be said that a prohibition of officially sanctioned prayer in public school classrooms violates neutrality by forcing the state

<sup>56</sup> See *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961), to the effect that non-theistic religions such as Ethical Culture and Secular Humanism come within the scope of the free exercise clause. See also the statement in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), that government may not prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion. *Id.* at 642. See also Ball, *supra* note 6.

<sup>57</sup> 343 U.S. at 313.

to use its schools to promote secularism as the officially established orthodoxy. Consistent with the decision the schools and government may still follow practices and educational programs that reflect a sympathetic awareness of religion and its relevancy to the life of the individual and the community. The state, then, was supporting a practice which sanctioned and gave a preferred position to the expression of religious ideas even though it was not constitutionally required to do so in the interests of either religious freedom or strict neutrality. This leaves the basic question of whether the Constitution does require a strict or absolute neutrality in regard to religious matters, or whether, in at least a limited way, government may in its institutional life and programs express a preference for the expression of religious ideas that are in accord with the national tradition and reflect the beliefs shared by a preponderant element of the community.

Numerous governmental practices at all levels make clear that government has never been absolutely neutral in religious matters. Moreover, the Court's opinion in *Engel* in sanctioning public school exercises which are viewed as primarily patriotic in character but also have religious significance seems to make clear that the public schools are not required in the interest of a strict neutrality to abandon exercises that invite student participation in expressions of religious faith.<sup>58</sup> What seems to be really important is not that government be strictly or abstractly neutral but that government in its policies and programs does not trespass in any significant way upon the rights of minorities. To criticize *Engel* on the ground that it permits a minority to exercise a commanding influence in determining public school policy is in itself a pointless argument since a major purpose of a constitutional system is to place a check on the will of the majority in the interest of protecting minority rights. There can be no quarrel with the Court's overruling the majority will in *Engel* if it may be assumed that minority rights were involved.

<sup>58</sup> For examples of governmental practices that reflect the nation's religious tradition and for criticism of the distinction made in the majority opinion between "patriotic or ceremonial occasions" and "an unquestioned religious exercise," see Mr. Justice Stewart's dissenting opinion in *Engel*, 370 U.S. at 446-50. See also the discussion in the text *supra* at 1040, 1042, 1046.

Reference may be also made at this point to the decision in *Zorach* sustaining the validity of a released-time program for religious instruction conducted off the school premises as supporting the proposition that the state may accommodate its official program to the recognition and furtherance of the religious interests of its citizens even though it is not constitutionally required to do so. Mr. Justice Douglas, who wrote the opinion in *Zorach*, had no difficulty in reconciling the released-time program with his concept of neutrality.

### B. *Personal Rights and the Standing Question*

This leads to a consideration of a major difficulty raised by *Engel*. The Court did not rest its decision on the ground that the prayer practice subjected objecting children to an implied pressure to participate and thereby offended freedom of religion or a personal freedom of conscience. Instead, the Court made it clear that it was resting its case on the establishment clause, and that this clause, while designed in part to protect individual freedom, was also designed to prevent a union of government and religion. But insofar as the establishment clause is invocable by individuals, must it not be shown that a practice alleged to constitute an establishment of religion infringes on constitutionally recognized freedoms or interests? At this point it is useful to inquire whether the prohibition of laws respecting an establishment of religion can be translated into a protection of some kind of fundamental freedom. For Madison and Jefferson it assumed significance as a protection for freedom of belief and conscience which transcends the more limited concept of freedom of religion. This view finds support in the following statement taken from Mr. Justice Roberts' opinion for the Court in *Cantwell v. Connecticut*:

"The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts—freedom to believe and freedom to act."<sup>59</sup>

Mr. Justice Roberts went to the heart of the matter when he interpreted the establishment clause to protect freedom of belief by forestalling *compulsion by law* of the acceptance of any creed or the practice of any form of worship.<sup>60</sup> This freedom is violated when

<sup>59</sup> 310 U.S. 296, 303 (1940). See also Madison's statement, when the first amendment was pending in Congress in substantially its final form, that "he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 ANNALS OF CONG. 730 (1834) [1789-1791]. This statement is quoted by Mr. Justice Reed in his dissenting opinion in *McCullum v. Board of Educ.*, 333 U.S. 203, 244 (1948).

<sup>60</sup> See, however, Professor Howe's criticism of Mr. Justice Roberts' interpretation on the ground that the establishment language, as stating a federal principle, namely, that Congress has no authority to deal with matters relating to religious establishment,

a person is forced to profess a belief whether or not contrary to conviction, is denied a right or privilege because of refusal to profess an officially sanctioned belief, or is forced to pay taxes in support of a church or religious practices. Unless the New York prayer practice, though voluntary in form, had the effect of indirectly coercing objectors who did not care to participate, it is difficult to see what rights were violated. It can hardly be claimed that taxpayers were subjected to any additional burden because of the use of school facilities or personnel in connection with the prayer exercise.<sup>61</sup>

Moreover, apart from the question of whether an individual in order to claim the protection of the establishment clause must show that his freedom of conscience is violated, the requirement of proper standing as a party in interest to raise constitutional questions must still be considered. What standing did the petitioners have in this case? They brought this suit as parents and the theory of the trial court, relying on the *Zorach* decision, was that the petitioners were asserting their right to control the education of their children and the right to be free from a religious practice in the public schools which was contrary to their own beliefs or unbeliefs and those of their children.<sup>62</sup> The Supreme Court did not even discuss the question of standing. It seems proper to infer then that the standing requisite to maintain the suit in the state court carried forward as a basis for standing before the Supreme Court. Since the Supreme Court has not disavowed the party in interest requirement, since it accepted a standing premised originally on a claim of violation of the petitioners' rights, and since it stated that it had agreed to review the case because it involved "rights protected by the First and Fourteenth Amendments,"<sup>63</sup> it appears to be implicit in the decision that some substantial legal interests of the petitioners were at stake in the case. Admittedly, however, the Court's express statement that it was not basing its holding on the ground that the prayer exercise

goes beyond the purpose of protecting individual rights. Howe, *The Constitutional Question*, in *RELIGION AND THE FREE SOCIETY* 49, 52-53 (The Fund for the Republic pamphlet, 1958). See also notes 64 and 75 *infra*.

<sup>61</sup> Mr. Justice Douglas' concurring opinion was squarely based on the theory that tax funds and property were used to support a religious exercise, but this emphasis does not appear in the majority opinion. See *Doremus v. Board of Educ.*, 342 U.S. 429 (1952), holding that taxpayers did not have standing to challenge the constitutionality of Bible reading in a public school, absent a showing that this practice resulted in added out-of-pocket costs to the operation of the school system.

<sup>62</sup> *Engel v. Vitale*, 18 Misc. 2d 659, 666-67, 191 N.Y.S.2d 453, 464-65 (Sup. Ct. 1959).

<sup>63</sup> 370 U.S. at 424.

was a violation of religious freedom and its failure to discuss the standing question emerge as puzzling aspects of the decision.<sup>64</sup>

Whatever questions are raised respecting the rights and the standing of the petitioners under the first amendment become even more acute when the restrictions of this amendment are translated into fourteenth amendment limitations. There is a danger of forgetting that the first amendment was not directly involved in the *Engel* case, since by its terms it is a limitation only on Congress. It becomes involved only on the theory that the fourteenth amendment operates in some way to make the first amendment applicable as a limitation on the states. On this question Mr. Justice Black's opinion is extraordinarily interesting. All that he found it necessary to say is that the first amendment's provisions "are operative against the States by virtue of the Fourteenth Amendment."<sup>65</sup> What language of the fourteenth amendment has this effect? On this point, Mr. Justice Black's opinion is eloquently and discreetly silent. But the fourteenth amendment is not an abstraction or some mysterious event in history achieving constitutional change without resort to words. Is it not pertinent to ask what language of the fourteenth amendment has the effect of making the first amendment applicable?

Any thorough exploration of the questions with respect to the interrelationship of the first and fourteenth amendments would unduly extend the scope of this article. But some basic theories of interpretation should be stated. Three lines of thought may be identified:

(1) The main line of interpretation of the fourteenth amendment, as a basis for protecting substantive and procedural rights against state impairment, has turned on the clause of its first section which states, "nor shall any State deprive any person of life, liberty or property, without due process of law." The classic theory expressed in the judicial gloss on this language is that the

<sup>64</sup> Although the opinion in *Engel* does not expressly deal with the question of whether the establishment clause protects a broad freedom of conscience, as distinguished from a narrower freedom of religion protected by the free exercise clause, it does on its face accord with Professor Howe's view [note 60 *supra*] that the establishment clause as a limitation on Congress goes beyond the purpose of protecting individual rights. In turn, the Court's failure to discuss the standing question may then be interpreted as suggesting a substantial modification, if not virtual abandonment, of the traditional party-in-interest concept so far as standing to raise the establishment question is concerned. For analysis and discussion of *Engel* with respect to the standing problem, see Sutherland, *Establishment According to Engel*, 76 HARV. L. REV. 25 (1962). See also Kurland, *supra* note 55.

<sup>65</sup> 370 U.S. at 430.

"liberty" clause serves to protect those freedoms which are ranked as fundamental and that there is no necessary relationship between these and the Bill of Rights.<sup>66</sup> In the application of this theory the *freedoms* of the first amendment came to be recognized as fundamental. Thus, in the *Cantwell* decision Mr. Justice Roberts stated that "the fundamental concept of liberty embodied in [the fourteenth amendment] embraces the liberties guaranteed by the First Amendment."<sup>67</sup> Whether the language used is that first amendment freedoms are ranked as fundamental or that they are absorbed or selectively incorporated into the due process clause, the result is the same, namely, the first amendment freedoms are a part of the liberty protected under the due process clause.

(2) A variant of the fundamental rights theory is that when liberties specified in the Bill of Rights are recognized as fundamental they have the same dimensions and quality, when incorporated into the due process clause, as they have in their original setting in the Bill of Rights and are subject only to the limitations there recognized. This may be characterized for purpose of convenience as the Brennan theory, since Mr. Justice Brennan has most clearly articulated this idea in recent cases.<sup>68</sup> This theory of interpretation becomes a means of enlarging the fundamental freedoms as limitations on state action since it by-passes the usual due process consideration that the fundamental liberties may be restricted so long as the state is acting reasonably to achieve legitimate governmental purposes. But this theory is still centered on the protection of fundamental freedoms.

(3) A third view, the one advanced by Mr. Justice Black and supported by Mr. Justice Douglas, which may be referred to as the Black theory, is that the effect of the fourteenth amendment was to make the entire Bill of Rights apply to the states.<sup>69</sup> Mr. Justice Black persists in this theory which he bases on an interpretation of historical intent despite its being discredited by legal historians.<sup>70</sup> The significance of this view is that it subjects the states to the Bill of Rights, without reference to the fundamental

<sup>66</sup> See *Adamson v. California*, 332 U.S. 46 (1947); *Palko v. Connecticut*, 302 U.S. 319 (1937).

<sup>67</sup> 310 U.S. at 303.

<sup>68</sup> See, e.g., *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, *rehearing denied*, 364 U.S. 855 (1960).

<sup>69</sup> See *Adamson v. California*, 332 U.S. 46, 68 (1947) (Black, J., dissenting).

<sup>70</sup> See *Bartkus v. Illinois*, 359 U.S. 121, 124 (1959); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949); Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 547 (1951).

freedoms concept and without regard to usual due process considerations.<sup>71</sup>

The relevancy of these three approaches to the first amendment question is apparent. Under all three views, the first amendment is recognized to have a special significance with respect to the states. But the "fundamental rights" interpretation and the Brennan theory place emphasis upon the freedoms of the first amendment, as part of the liberty protected under the due process clause, whereas under the Black view all of the first amendment is applicable to the states and hence it is not necessary to inquire whether a question of fundamental freedoms is involved. The practical effect of his theory is that by judicial act the first amendment is amended to read, "Neither Congress *nor the States* shall make any law respecting an establishment of religion . . . ." Thus, he could rest his opinion in *Engel* on the establishment clause without finding that the petitioners' freedoms were violated. Moreover, since the first amendment's language is absolute, there is no place in Mr. Justice Black's thinking for an inquiry into whether the state had acted in an arbitrary or unreasonable way in impinging upon the petitioners' interests.<sup>72</sup>

The interpretation of the first amendment's establishment clause as a limitation on the states without regard to the usual due process considerations was already foreshadowed in the *Everson* and *McCullum* decisions. But *Everson* turned on the right of a taxpayer not to have out-of-pocket expenditures of tax funds made in support of religious activities,<sup>73</sup> and *McCullum* could be interpreted to turn on the right of a person who was both taxpayer and parent not to have school property used in a substantial way for religious instruction and not to have her child's freedom impaired by a public school attendance requirement imposed only on those who did not attend the religious education classes.<sup>74</sup> The *Engel* opinion, however, is unique in that it finds a state practice

<sup>71</sup> In *Adamson v. California*, 332 U.S. 46 (1947), Mr. Justice Black in his dissenting opinion indicated that the Bill of Rights is made applicable to the states by means of the privileges and immunities clause of § 1 of the fourteenth amendment. *Id.* at 71-72.

<sup>72</sup> See *Konigsberg v. State Bar*, 366 U.S. 36, 56 (1961) (Black, J., dissenting).

<sup>73</sup> The preamble to the "Virginia Bill of Religious Liberty," quoted in the Court's opinion, 330 U.S. at 12-13, contains the following passage: "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."

<sup>74</sup> There was, however, no showing in *McCullum* that students were *in fact* coerced to attend the religious education classes. For a discussion of the *McCullum* and *Zorach* cases with respect to the standing problem posed by *Engel*, see Kurland, *supra* note 55; Sutherland, *supra* note 64.

invalid as an establishment of religion without regard to whether it offended any rights or interests of the petitioners.

It is not surprising that Mr. Justice Black in his *Engel* opinion saw the problem as wholly a first amendment establishment question, unrelated to the due process clause and the deprivation of liberty, since he has committed himself to this view. What is surprising is that some other members of the Court who supported the majority opinion appeared *sub silentio* to endorse a view of the first and fourteenth amendment interrelationship which rests on a spurious interpretation of history, disregards the main line of fourteenth amendment interpretation, and marks a bold high in the long history of judicial free-wheeling in the construction of this amendment.<sup>75</sup>

Whatever significance may attach to the surface of the opinion in *Engel*, some aspects of the case do suggest that the decision finds its ultimate justification on the ground that the prayer practice carried a compulsive force notwithstanding its apparent voluntary character, and that it therefore resulted in violation of freedom of conscience. Why should the Court otherwise have emphasized all the elements of the exercise that gave it such an official nature? Indeed, Mr. Justice Black stated that the "indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."<sup>76</sup>

Regardless of its underlying theory, the *Engel* decision does suggest substantial problems with respect to protection of minority rights. How far may the dominant sentiment of the community be given expression in the public schools, or for that matter in public life generally, where the expression of this sentiment is offensive to minority groups? The answers to these questions, inherent in our pluralistic society, are not easy. Must all practices offensive to minority groups be barred, or is it enough that they be free not to participate? We may put alongside the problem of *Engel* the question presented in *West Virginia State Bd. of Educ. v. Barnette*,<sup>77</sup> where the Court held that a Jehovah's Witness could not be denied the privilege of attending a public

<sup>75</sup> On the question whether the establishment limitation of the first amendment, as stating a federal principle in placing a jurisdictional limit on congressional power, should have any carry-over to the fourteenth amendment except in terms of protection of fundamental rights, thereby permitting states to take such action "in aid of religion as does not appreciably affect the religious or other constitutional rights of [others]," see *Howe, supra* note 60, at 53-57; *Freund, supra* note 70, at 533-34. See also note 64 *supra*.

<sup>76</sup> 370 U.S. at 431.

<sup>77</sup> 319 U.S. 624 (1943).



school because of his refusal to stand up and salute the flag at a school exercise held at the beginning of the day. For the Jehovah's Witnesses a salute to the flag is an obeisance which is idolatrous and, therefore, offensive to their religious beliefs. Mr. Justice Jackson, delivering the opinion of the Court, did not rest the case on the ground of religious freedom but significantly on the broader ground of freedom of thought. In the well-known passage from his opinion, he said:

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."<sup>78</sup>

But there was no indication that the school board was under a duty to eliminate the flag-salute exercise in order to protect the Jehovah's Witnesses against the embarrassment and pressures arising from their non-participation. It was enough that the Jehovah's Witness could not be compelled to take part. What distinguishes this case from *Engel* where the Court finds that the prayer exercise must be discontinued? Superficially, the distinction suggests itself that in the flag-salute case the state is promoting a proper secular purpose—cultivation of patriotic sentiments. Even if this distinction is tenable, it does indicate that the extent to which public schools may engage in practices that are offensive to conscience is a question of degree. But actually the distinction is not as convincing as it seems. Mr. Justice Jackson's opinion in *Barnette* rested on the ground that the state may not prescribe any orthodoxy or force citizens to confess their faith therein. In other words, quite apart from the specific prohibition on the establishment of religion, the state may not officially establish any faith—political or religious. At this point it should also be noted that Mr. Justice Black said in *Torcaso v. Watkins*<sup>79</sup> that religious freedom under the Constitution extends to such non-theistic religions as Ethical Culture and Secular Humanism. Putting *Barnette* and *Torcaso* together, it may be said, then, that the Constitution forbids the establishment of either theistic or non-theistic orthodoxies. If this is so, then it may be questioned whether in the interest of protecting the non-conformist a distinction should

<sup>78</sup> *Id.* at 642. It should be noted, however, that Justices Black, Douglas, and Murphy in their concurring opinions laid stress on the religious freedom argument.

<sup>79</sup> 367 U.S. 488, 495 n.11 (1961).

be observed between the state's promoting a non-theistic political orthodoxy which offends a minority religious group and its action in promoting a theistic orthodoxy which offends a minority of believers and non-believers. If the protection afforded in the name of religious freedom against a state-prescribed non-theistic orthodoxy is that a person cannot be compelled to participate, whereas the protection afforded in the name of the establishment clause is that a person may demand that any exercise promoting theistic belief be completely eliminated, the result is that the freedom protected by the establishment clause is regarded as having a higher value than the freedom protected by the free exercise clause. Perhaps the simplest explanation of this situation is that the Jehovah's Witnesses have not demanded that the flag salute exercise be completely eliminated in order to avoid an implied coercion on their children to participate, but to point up this problem is to indicate that the degree of protection accorded non-conformists who object to public practices they find offensive is a matter requiring further careful probing.<sup>80</sup>

To state the problem in this way is to recognize that the first amendment's explicit clause respecting an establishment of religion, as well as its implied prohibition of the establishment of any kind of orthodoxy, as recognized in *Barnette*, cannot be given an absolute construction but must be balanced against a variety of competing factors, including considerations of community interest that are legitimated by American life and experience. In construing the freedoms expressly safeguarded by the first amendment—freedom of religion, freedom of speech and freedom of press—the Court has recognized that these freedoms, whether as first amendment freedoms, or as absorbed into the liberty protected by the fourteenth amendment, are not absolute, but may be restricted by legislation directed to the protection of appropriate public interests as defined by the legislature.<sup>81</sup> Why

<sup>80</sup> The New York trial court recognized that, even with restrictions on the prayer practice designed to secure freedom of non-participation, some subtle pressures might operate on persons not desiring to participate. But on this point Justice Meyer stated that the disadvantages of non-conformity are inherent in the American situation, and that objections to pressure placed on private persons by persons other than the state cannot be elevated to the level of a constitutional freedom. *Engel v. Vitale*, 18 Misc. 2d 659, 695, 191 N.Y.S.2d 453, 491-92 (Sup. Ct. 1959).

<sup>81</sup> See, e.g., *Freedom of Religion*: *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Reynolds v. United States*, 98 U.S. 145 (1878); *Freedom of Speech*: *Scales v. United States*, 367 U.S. 203 (1961); *Dennis v. United States*, 341 U.S. 494 (1951); *Freedom of the Press*: *Roth v. United States*, 354 U.S. 476 (1957); *Beauharnais v. Illinois*, 343 U.S. 250, *re-hearing denied*, 343 U.S. 988 (1952). See also the majority opinion in *Konigsberg v. State Bar*, 366 U.S. 36 (1961).

the establishment limitation and the liberties implicit in it should be elevated to a higher place than these freedoms has not been made clear. James Madison's "three pence" argument,<sup>82</sup> if valid to support an absolutist interpretation of the establishment principle, should be equally valid to support the absolutist interpretation which the Court has rejected in its interpretation of the first amendment freedoms generally.<sup>83</sup>

Is it the effect of the *Engel* decision to bar the recitation of prayers by public school children in the situation where no parents voice an objection? Conceivably there are communities in the United States where all parents are ready and willing to have their children participate in such a practice. If the *Engel* case rests on an abstract and absolute non-establishment limitation, unrelated to infringement upon personal liberty, all school boards are in principle bound thereby, even though in the absence of objecting parents a serious standing problem would be presented as regards the bringing of a lawsuit to compel the school board to comply with the law as established by the *Engel* decision.<sup>84</sup> If, as has been suggested, the *Engel* case finds its real justification in the consideration that the officially prescribed prayer subjected all children to a compulsion to participate and thereby impaired the liberty of children and their parents, then *Engel* has no relevancy where all parents are willing to have their children participate. In a country as large as the United States, with great variations in the communities so far as religious elements are concerned, there is no compelling reason why the Constitution should be interpreted to require a uniform rule prohibiting all prayer exercises, without regard to the elements of coercion, impairment of rights of objectors and the effect of the exercises in promoting community divisiveness.

<sup>82</sup> See text *supra* at 1039 for the passage from Madison quoted in the *Engel* opinion.

<sup>83</sup> In an address delivered at the University of Utah, Feb. 27, 1963, in which he criticized the "absolutist" approach of the majority opinion in the *Engel* decision, Dean Erwin N. Griswold of the Harvard Law School said: "If one thinks of the Constitution as a God-given text stating fixed law for all time, and then focuses on a single passage, or indeed on two words—'no law'—without recognizing all the other words in the whole document, and its relation to the society outside the document, one can find the answers very simply. . . . The absolutist approach involves, I submit, a failure to exercise the responsibilities—and indeed the pains—of judgment. By ignoring factors relevant to sound decisions, it inevitably leads to wrong results." Excerpts from Dean Griswold's address appeared in the public press. See, e.g., *Ann Arbor News*, Feb. 28, 1963, p. 13.

<sup>84</sup> In *Doremus v. Board of Educ.*, 342 U.S. 429 (1952), the Court held that a taxpayer did not have standing before the Court to contest the validity of a Bible-reading practice, in the absence of a showing that the practice resulted in added out-of-pocket costs to the operation of the school system. See Sutherland, *supra* note 64, at 32-35, 39-42.

## V. CONCLUSIONS

Viewed with respect to the precise problem before the Court, the decision in *Engel* is not a disturbing one, when evaluated in terms of underlying policy considerations. Prayer, religious faith, and the freedom of religion are not damaged by the Court's holding. On the contrary, the decision maintains the dignity and religious significance of prayer by keeping it free from state compulsion and interference, and, by the same token, it preserves the freedom of both the believer and the non-believer in respect to prayer. Nor should it be of consequence that the prayer was "non-sectarian." Even such a prayer can be productive of religious divisiveness, not only because it is objectionable to non-believers or non-theistic religionists, but also because theistic believers may find it an offense to conscience to engage in prayer except in accordance with the tenets of their own religion. Moreover, religionists can have little enthusiasm for an officially sanctioned non-sectarian expression of religious belief which at most reflects a vague and generalized religiosity. Any usefulness of a prayer practice in public schools as symbolic of the religious tradition in our national life, of the values of religion to our society, and of religious ideas shared in common, must be weighed against the peril that the official promotion of common-denominator religious practices, conspicuous by their vagueness and syncretistic character, will contribute to the furtherance and establishment of an official folk or culture religion which many competent observers regard as a serious threat to the vitality and distinctive witness of the historic faiths.<sup>85</sup>

The decision makes sense in terms of constitutional considerations if the case is confined to the fact emphasized by the Court and if the constitutional rights of objecting parents and children are viewed as vital to the result. It is, however, the Court's broad and absolutist interpretation of the first amendment, its disregard of the sanctions furnished by history for religious practices in the public schools, its indifference to the problem of standing, its failure to relate the establishment limitation to meaningful considerations of personal liberty—a failure all the more conspicuous when the relevancy of the fourteenth amendment is taken into account—and its failure to come to grips with the delicate problem of the rights of non-conformists in a com-

<sup>85</sup> See HERBERG, *PROTESTANT, CATHOLIC, JEW* 254-72 (Doubleday paperback ed. 1960); MARTY, *THE NEW SHAPE OF AMERICAN RELIGION* 31-89 (1959).

munity that recognizes a common religious heritage that present the constitutional problems and difficulties. A decision resting on the narrower ground of freedom of religion or of conscience, explaining why the considerations advanced in support of the prayer practice were outweighed by the rights of the objectors, and why under the circumstances the feature of voluntary participation did not sufficiently protect the interests of objectors, would have been much more satisfactory. The Court's reliance instead on a broad and abstract ground of establishment warrants Reinhold Niebuhr's criticism that the Court used a meat-axe when it should have used a scalpel.<sup>86</sup>

The issue raised in *Engel* is symptomatic of the problem we face in a religiously pluralistic society. Protestantism can no longer claim a dominating position in shaping the American *ethos*. It is understandable that practices such as prayers and Bible reading in public schools, which had their origin in days of Protestant domination, should come under fresh scrutiny as the Court exercises its role of accommodating constitutional interpretation to the changing social scene, although it would be refreshing to have the Court acknowledge its creative and policy-making function in this respect instead of making it appear that the result is required either on the basis of a literal textual exegesis or by reference to the intent of the Founding Fathers. The larger question, however, is whether and to what extent the government and its institutions may reflect a dominant religious consciousness of the community that has its roots in the nation's history and tradition. Due regard for our religious pluralism as well as for the larger pluralism that takes account of non-theistic ideologies and non-belief requires that government, in any recognition it gives to the dominant religious consciousness, carefully abstain from practices that in any significant way coerce conscience or otherwise impair minority rights. On the other hand, it is equally clear that the Constitution, in establishing a secular state that cannot prescribe any official belief or creed for its citizens, whether theistic or non-theistic and whether religious or political, does not require and, indeed, does not permit government to establish secularism or secular humanism as the nation's orthodoxy.

Religionists have ground for complaint if the public schools by studied indifference teach that belief in God is irrelevant to

<sup>86</sup> Niebuhr, *The Court and the Prayer: A Dissenting Opinion*, *The New Leader*, July 9, 1962, p. 3.

life. The *Engel* decision does not require such indifference. Consistent with it the schools may follow practices and teaching programs that help to create awareness, appreciation and understanding of the religious factor in the life of the nation and its citizens. They may create respect for the moral values which reflect the community consensus and which illuminate the purposes and processes of our democratic society. But it is not their responsibility or function to cultivate an official faith or ideology, whether religious or humanistic in character, or to indoctrinate students in any system of beliefs and values that rests on a claim of insight into ultimate truth with respect to the meaning and purpose of life. Parents who desire religious instruction for their children as part of a school program have the option of sending them to parochial schools. One effect of the school prayer decision is to highlight the importance of private schools and of the parents' freedom of choice in our free and pluralistic society that does not recognize governmental monopoly of the educational process. But the majority of Americans who are concerned with the relevancy of religious teaching to the total educational program do not see the parochial school as the answer to the problem. Their interest may lie in the further development of dismissed- or released-time programs in connection with the operation of the public school systems.<sup>87</sup> Moreover, in view of the present impasse with respect to the parochial school situation, it may well be that the shared-time plan offers the greatest promise for reconciling the felt needs for religious instruction with the secular limitations placed on the public school systems.<sup>88</sup> All proposals of this kind deserve careful study. Needless to say, any constructive solution to the problem will require a generous measure of sympathetic understanding, good will and tolerance on the part of all concerned elements of the community.

Whatever the merits of plans for accommodating the educational system to programs of formal religious instruction, they should not serve to obscure the fundamental consideration that

<sup>87</sup> On the question whether in the light of the *Engel* case the Supreme Court will continue to adhere to its decision in the *Zorach* case, sustaining the validity of a released-time program when conducted off the public school premises, see the discussion in the text *supra* at 1045.

<sup>88</sup> For a discussion of shared-time proposals whereby children will receive a part of their instruction in parochial schools and a part in the public schools, see STAFF OF HOUSE COMMITTEE ON EDUCATION AND LABOR, 87TH CONG., 2D SESS., *PIONEER IDEALS IN EDUCATION* 55-59 (Comm. Print 1962); Cassels, *A Way Out of Our Parochial-Public School Conflict*, *Look*, Aug. 28, 1962, p. 54; *Symposium: Shared Time*, 57 *RELIGIOUS EDUCATION* 5 (1962).

the cultivation of religious faith is the responsibility of home and church. If secularism triumphs as the dominant American ideology, it will not be because of the Constitution or the Supreme Court or because the public schools have failed in their limited tasks, but because meaningful and vital religious faith has lost its place in the hearts and lives of the people. The *Engel* decision is a forceful reminder to parents and the churches that theirs is the task and responsibility of making prayer, worship and religious instruction rich and meaningful in the lives of their children.